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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 429

HURLBUT W. SMITH, PETITIONER,

vs.

FRANK J. SHAUGHNESSY, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE TWENTY-FIRST DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1942.

CERTIORARI GRANTED NOVEMBER 9, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol.1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

Civil #386

HURLBUT W. SMITH, Plaintiff-Appellee,

vs.

FRANK J. SHAUGHNESSY, Collector of Internal Revenue for the Twenty-first District of New York, Defendant-Appellant.

STATEMENT UNDER RULE 13

The above entitled action for recovery of alleged erroneous United States gift taxes for 1937 paid by the plaintiff was commenced in the United States District Court for the Northern District of New York by filing of complaint with the Clerk of said Court March 14, 1940, and issuance and service of the summons and complaint on the defendant Collector March 14, 1940. Judgment for the plaintiff was entered September 10, 1941, in amount of $40,109.19 with interest from March 18, 1938, and costs of $24.60.

The above caption shows the names of the plaintiff and defendant. There have been no parties added and there [fol. 2] has been no change in the parties thereto or their attorneys, or on this appeal.

Mackenzie, Smith & Michell, Attorneys of Syracuse, N. Y., appeared and appear for the plaintiff-appellee, and Ralph L. Emmons, U. S. Attorney for the Northern District of New York of Binghamton, N. Y., for the defendant-appellant.

The dates of filing the respective pleadings are stated in the record.

The trial was held at Syracuse, N. Y., October 28, 1941, before Honorable Frederick H. Bryant, U. S. District Judge, without a jury, and a copy of his opinion is printed in full in the record. Stipulation of most of the pertinent facts is printed in the stenographer's minutes.

Appeal was taken by the defendant December 10, 1941.

IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF NEW YORK

[Title omitted]

COMPLAINT—Filed March 14, 1940

Comes the plaintiff above named, and for his cause of action against the defendant herein alleges:

[fol. 3] 1. That he is a citizen of the State of New York and of the United States, and a resident of the City of Syracuse, County of Onondaga and State of New York, and of the Northern District of New York, and brings this action, arising under the Internal Revenue Laws of the United States, against the defendant above namod to recover the sum of $71,674.22, with interest thereon, representing gift taxes illegally and erroneously assessed and exacted from plaintiff.

2. That at all the times herein mentioned the defendant, Frank J. Shaughnessy, was and now is a resident of the City of Syracuse, County of Onondaga and State of New York, and of the Northern District of New York, and was and now is the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the Twenty-first District of New York.

3. Plaintiff further alleges that on the 26th day of February, 1937, pursuant to the provisions, among others, of a certain Trust Indenture dated on that day, executed by and between the said plaintiff and The Syracuse Trust Company, a banking corporation of Syracuse, New York, the plaintiff assigned, transferred and set over irrevocably unto said The Syracuse Trust Company and its successors three thousand (3,000) shares of the convertible preferred stock of L. C. Smith & Corona Typewriters, Inc., a New York corporation, having its principal office and place for the transaction of business in the City of Syracuse, New York, in trust nevertheless, to manage and control said property and to keep the same or the proceeds thereof invested, and to collect the income thereof and to pay over the net income from said trust fund quarterly to and for the use of Gladys D. Smith, wife of the plaintiff, during [fol. 4] her life, and upon her death, to pay over the principal of said trust fund to the plaintiff, if he be then living, or

in the event of the death of the plaintiff, prior to the death of his said wife, to pay over said principal of said trust to such person or persons and in such amounts and proportions as the said life beneficiary should by her last will and testament direct, and in the event of her failure to make testamentary disposition thereof, then to such person or persons and in such amounts and proportions as would take the same under the Laws of the State of New York in case the principal of said trust fund had been owned outright by the said life beneficiary and she had died intestate.

4. That thereafter, upon a return of said transaction made and filed with the defendant by plaintiff on or about March 15, 1938, the said defendant, Collector for the Twenty-first District of New York, assessed a Federal Gift Tax thereon in the amount of $71,674.22, which tax was paid by plaintiff to the defendant Collector as aforesaid, on March 15, 1938.

5. That thereafter, and on or about March 18, 1938, the plaintiff filed with said defendant, Collector as aforesaid a duly verified claim, in form as approved by law, for the refund of said tax so assessed, collected and paid, on the ground that the transfer set forth in said Trust Indenture did not constitute a taxable gift. True copies of said claim and of the said Trust Indenture thereto annexed, are hereto attached, Marked "Schedule A" and are hereby referred to and made a part of this complaint.

6. That thereafter, and on or about April 15, 1938, the Commissioner of Internal Revenue rejected said claim for refund in its entirety and, on said date, as plaintiff is informed and believes, sent to plaintiff by registered mail [fol. 5] a copy of his letter of rejection dated on said date, which letter was received by plaintiff on or about April 16, 1938, said letter stating in part as follows:

"Your claim is based upon the contention that the value of the trust estate created by the trust agreement of February 26, 1937, for the benefit of your wife, does not constitute a taxable gift.

Since it appears from the trust agreement that you have parted with all dominion and control over the trust estate and have no power to cause the beneficial title of the trust estate to be revested in yourself, the transfer is complete and taxable under the provisions of article 3 of the Regula-

tions 79 (1936 Edition) relating to the gift tax under the Revenue Act of 1932, as amended and supplemented by the Revenue Acts of 1934 and 1935.

Accordingly, your claim for refund is rejected in its entirety."

A true copy of said letter rejecting said claim for refund is hereto attached marked "Schedule B" and is hereby referred to and made a part of this complaint.

7. That as plaintiff is informed and believes, the transfer under said Trust Indenture did not and does not constitute a taxable gift under the Internal Revenue Laws of the United States, and that the aforesaid tax thereon was illegally and erroneously assessed and collected and that no part of said tax has been refunded or repaid.

Wherefore plaintiff demands judgment against the defendant for said sum of $71,674.22 with interest thereon [fol. 6] from March 15, 1938, together with the costs and disbursements of this action.

Mackenzie, Smith & Michell, Attorneys for Plaintiff, Office & Postoffice Address, 821 Onondaga County Savings Bank Building, Syracuse, New York.

William A. Mackenzie, Basil B. Aylesworth, Members of the firm of Mackenzie, Smith & Michell, and two of the attorneys of record for plaintiff.

Duly sworn to by Hurlbut W. Smith. Jurat omitted in printing.

[fol. 7] SCHEDULE "A"

Claim

To be filed with the Collector where assessment was made or tax paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

(V) Refund of tax illegally collected.
( ) Refund of amount paid for stamps unused, or used in error or excess.
( ) Abatement of tax assessed (not applicable to estate or income taxes).

STATE OF NEW YORK,
County of Onondaga, ss:

(Type or Print)

Name of taxpayer or purchaser of stamps, Hurlbut W. Smith.

Business address, 701 E. Washington St., Syracuse, New York.

Residence, 1111 James St., Syracuse, New York.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, 21st New York.

2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1937, to Dec. 31, 1937.

[fol. 8] 3. Character of assessment or tax, Gift tax.

4. Amount of assessment, ~~$71~~,674.22; dates of payment, March 15, 1938.

5. Date stamps were purchased from the Government.

6. Amount to be refunded, $71,674.22.

7. Amount to be abated (not applicable to income or estate taxes) $——.

8. The time within which this claim may be legally filed expires, under Section 501-532 of the Revenue Act of 1932, March 15, 1941.

The deponent verily believes that this claim should be allowed for the following reasons:

(1) That the transfer set forth in the Trust Indenture upon which said tax was based (a true copy of which Indenture is hereto annexed and marked "Exhibit A") did not constitute a taxable gift;

(2) That in and by the terms of said Trust Indenture it is provided that upon the death of the life beneficiary, the Trustee shall pay over the principal of the trust fund to the Settlor, Hurlbut W. Smith, the claimant herein, if he is then living, and that said Trust Fund therefore does not constitute a taxable gift.

Signed Hurlbut W. Smith.

Sworn to and subscribed before me this 18th day of March, 1938. Henry A. Eiler, Notary Public. (Seal.)

[fol. 9] EXHIBIT "A" TO CLAIM

This Indenture, made, executed and delivered in the City of Syracuse, Onondaga County, New York, on the 26th day of February, 1937, by and between Hurlbut W. Smith, of said City (hereinafter called the "Settlor"), and The Syracuse Trust Company (hereinafter called the "Trustee", Witnesseth:

First—The Settlor hereby assigns, transfers and sets over irrevocably unto the Trustee and its successors all the following described property:

Three Thousand (3,000) shares of the Convertible Preferred Stock of L. C. Smith & Corona Typewriters, Inc.

To Have and To Hold unto the Trustee and its successors, in trust however for the uses and purposes following:

1. To care for, manage and control the said property (including any and all that may be hereafter assigned by the Settlor to the Trustee by written assignment therein expressly stated to be for the purposes set forth in this Indenture and subject to the terms and conditions hereof), to keep the same, or the proceeds thereof, invested, to collect the income thereof, and to pay over the net income from said trust fund quarterly to and for the use of Gladys D. Smith, wife of the Settlor, (hereinafter sometimes called the "Life Beneficiary"), during her life, and upon her death to pay over the principal of said trust fund to the Settlor, Hurlbut W. Smith, if he is then living, or in the event of the death of said Settlor prior to the death [fol. 10] of the said Life Beneficiary, to pay over said principal of said trust fund as follows:

The Trustee shall upon the death of the said Life Beneficiary pay over the principal of said trust to such person or persons and in such amounts and proportions as the said Life Beneficiary may by her last will and testament direct, and in the event of her failure to make testamentary disposition thereof, then and in that event the principal of the trust herein created for her life shall be paid over and delivered by the Trustee to such person or persons and in such amounts and proportions as would take the same under the laws of the State of New York in case the principal of said trust fund had been owned outright by the said Life Beneficiary and she had died intestate.

2. No assignment or order of the Life Beneficiary by way of anticipation of any part of the income of the trust herein created shall be valid, but the income shall be paid by the Trustee to the person entitled to receive it under the provisions hereof, or deposited to her account in some bank of good standing and repute, without regard to any assignment or order. Nor can the principal or income of said trust become attached by trustee process or garnishment or other legal proceeding while in the hands of the Trustee, except to the extent permitted by the laws of the State of New York.

3. The Trustee may receive any other property, real or personal, including life insurance policies, devised, bequeathed, assigned, granted or conveyed by the Settlor or by any other person for the purpose of the trust hereby created, and all such property shall be held by the Trustee subject to the terms of this Indenture in the same manner as if it had been included in the description of the property [fol. 11] hereby transferred to the Trustee. Any sums of money or other property so received shall immediately constitute a trust fund and be added to the principal of the trust created hereby, to be held, managed and invested, and payments therefrom made in accordance with the provisions hereof.

4. The Trustee shall have full power and authority to hold and retain any of the property coming into its hands hereunder, or that may hereafter become subject to the terms of this Indenture, in the same form of investment as that in which it is received by it, although it may not be of the character of investment permitted by law to trustees.

The Settlor reserves to himself during his lifetime, however, the power to direct the sale or retention of any such assets or of any other assets that may hereafter be purchased by the Trustee and become part of the principal of the trust created hereby, at such times and for such price as he may think wise, and the power to supervise the reinvestment of any moneys at any time in the hands of the Trustee, and the Trustee is is hereby relieved from any and all liability because of any such sale, retention or reinvestment if the same be authorized or directed by the Settlor by instrument in writing signed by him and filed with the Trustee. The Settlor also reserves to himself during his lifetime the power to require the Trustee to execute proxies to him or his nominee to vote any shares of stock at any time held by the Trustee as part of the principal of the trust created hereby, and the Trustee hereby agrees, upon request of the Settlor in writing signed by him and filed with the Trustee, to execute and deliver any such proxies.

5. In the event of the death of the Settlor prior to the termination of the trust created hereby the Trustee shall [fol. 12] thereafter have absolute authority, in its absolute and uncontrolled discretion, to sell, lease, mortgage or exchange the whole or any part of any property at any time constituting a part of the principal of the trust created hereby, upon such terms and conditions as may to it seem advisable, and to invest and reinvest any of the trust funds held hereunder as to it may seem proper, although the same may not be of the character of investment permitted by law to trustees.

6. Without intending to impose any legal obligation upon the Trustee or to restrict its action in the exercise of any discretionary powers granted to it hereby, the Settlor desires to express the wish that after his death the Trustee keep the Life Beneficiary of the trust hereby created fully advised as to the nature and condition of the trust property held by it for her life benefit and advise and confer with her from time to time regarding the investment and reinvestment of the principal of the trust held for her life benefit under the provisions of this Indenture.

7. If so directed by the Settlor during his lifetime by an instrument in writing duly signed by him and filed with the Trustee, and in its absolute and uncontrolled discretion

after the death of the Settlor and during the continuance of this trust, the Trustee shall have the right to exchange any of the stocks, bonds and/or other securities constituting the trust for the stocks, bonds and/or other securities of any corporation or corporations which may be a party to any reorganization for the purpose of conducting a business of the same kind or similar to or including that conducted by the company the stocks, bonds and/or other securities of which are so exchanged, whether such stocks, bonds and/or other securities be received in whole or in [fol. 13] part payment for the stocks, bonds and/or other securities exchanged.

8. The Trustee shall apply the entire income of all securities at any time held by it hereunder to the use of the Life Beneficiary irrespective of the price paid for them or their market value at any time, it being intended hereby that no part of such income shall be applied as a sinking fund to offset the gradual loss of the premium upon or market value of such securities. All taxable stock dividends, rights and capital gains shall be trated as principal so far as permitted by law, and any income tax that may become payable thereon shall be paid by the Trustee from the principal.

8. The Trustee shall annually render an account to the Life Beneficiary, and such account, when approved by such Life Beneficiary, shall be binding and final upon all parties, and, together with receipts for full payments in accordance therewith shall be a full acquittance and release to the Trustee without any further accounting in any court.

10. The Trustee may resign at any time on giving thirty days notice of such resignation, and upon such resignation becoming effective, or if the Trustee shall for any reason become incapable of performing its duties, the Settlor, if living, and in case of his prior death the Life Beneficiary of the trust, shall appoint a successor trustee by instrument in writing signed by him or her in duplicate, one of which duplicates shall be filed with the successor trustee and one with the Trustee named herein, whereupon the Trustee herein named shall forthwith account to such successor trustee, and such successor trustee shall thereafter have all of the powers and be subject to the same requirements [fol. 14] as those provided hereby with respect to the Trustee herein named.

11. The trust hereby created shall be deemed a New York trust, and shall in all respects be governed by the laws of the State of New York.

Second—The Trustee accepts said trust, and agrees to carry out the provisions hereof on its part.

In Witness Whereof, the Settlor has hereunto set his hand and seal, and the Trustee has caused these presents to be executed by its duly authorized officer and its corporate seal to be hereunto affixed, the day and year first above written.

Hurlbut W. Smith, (L. S.) The Syracuse Trust Company, by Harold C. Beatty, Trust Officer.

State of New York,
County of Onondaga, ss.:

On this 26 day of February, 1937, before me personally appeared Hurlbut W. Smith, to me known and known to me to be the same person named in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Harriet M. Baldwin, Notary Public, Onondaga Co., N. Y.

[fol. 15] State of New York,
County of Onondaga, ss.:

On this 26 day of February, 1937, before me personally appeared Harold C. Beatty, to me known, who being duly sworn deposes and says that he resides at Skaneateles, N. Y., and is the Trust Officer of The Syracuse Trust Company, the corporation named in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument in such corporate seal, that it was so affixed thereto by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Harriet M. Baldwin, Notary Public, Onondaga Co., N. Y.

Schedule "B"

Copy of Letter from Treasury Department—Washington

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and Refer to MT-ET-GT-234-37-21st New York.

Donor—Hurlbut W. Smith. Apr. 15, 1938.
Mr. Hulbut W. Smith, 701 East Washington Street, Syracuse, New York.

[fol. 16] Sir:

Reference is made to your claim, Form 843, filed on March 15, 1938, for refund of Federal Gift Tax paid for the calendar year 1937 in the amount of $71,674.22.

Your claim is based upon the contention that the value of the trust fund created by the trust agreement of February 26, 1937, for the benefit of your wife, does not constitute a taxable gift.

Since it appears from the trust agreement that you have parted with all dominion and control over the trust estate and have no power to cause the beneficial title of the trust estate to be revested in yourself, the transfer is complete and is taxable under the provisions of article 3 of the Regulations 79 (1936 Edition) relating to the gift tax under the Revenue Act of 1932, as amended and supplemented by the Revenue Acts of 1934 and 1935.

Accordingly, your claim for refund is rejected in its entirety.

Respectfully, Guy T. Helvering, Commissioner, by
(Signed) D. S. Bliss, Deputy Commissioner.

[fol. 17] In District Court of the United States, Northern District of New York

[Title omitted]

Answer—Filed June 7, 1940

The defendant for answer to the complaint herein

1. Admits all the material allegations thereof except he denies the allegations in paragraph 1, that the action is for a sum of money "representing gift taxes illegally and erroneously assessed and exacted from the plaintiff," and denies the allegations contained in paragraph 7 that "the transfer under the said Trust Indenture did not and does not constitute a taxable gift under the Internal Revenue Laws of the United States, and that the aforesaid tax thereon was illegally and erroneously assessed and collected."

2. As an affirmative defense to any alleged personal liability of defendant, said defendant alleges that all his acts in respect to said tax and matters alleged in the complaint were performed pursuant to the provisions of law and to the official duties of his office as Collector of Internal Revenue of the United States for the 21st District of New [fol. 18] York, and under the directions of the United States Commissioner of Internal Revenue.

Wherefore, defendant demands that said complaint be dismissed with costs.

Ralph L. Emmons, United States Attorney and Attorney for Defendant, Office and Postoffice Address, Federal Building, Binghamton, N. Y.

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

[Title omitted]

Statement of Evidence

Minutes of Proceedings had in the above entitled Matter at a Regular Term of the United States District Court held in and for the Northern District of New York, Federal Building, Syracuse, New York, on Monday, October twenty-eighth (28), 1940, commencing at ten-thirty o'clock in the forenoon, Eastern Standard Time.

Presiding: Honorable Frederick H. Bryant, United States District Judge.

[fol. 19] Appearances:

Messrs. Mackenzie, Smith and Michell, Attorneys and Counselors at Law, Onondaga County Savings Bank Building, Syracuse, New York, (Willis H. Michell, Esquire, and Basil B. Aylesworth, Esquire, of Counsel, appearing) Solicitors for the Plaintiff.

Honorable Ralph L. Emmons, United States Attorney in and for the Northern District of New York, by

B. Fitch Tompkins, Esquire, Assistant United States Attorney; and

Julian G. Gibbs, Esquire, Special Assistant to the Attorney General, Washington, D. C., Solicitors for the Defendant.

Mr. Michell: May it please the Court: This is an action brought by Hurlbut W. Smith against Frank J. Shaughnessy, Collector of Internal Revenue of the United States for the Twenty-first District of New York to recover a gift tax paid by him on or about March 15, 1938.

On February 26, 1937 Mr. Smith executed a trust indenture to the Syracuse Trust Company, as Trustee, whereby he established a trust fund consisting of three thousand shares of the six per cent convertible preferred stock of the L. C. Smith and Corona Typewriters Inc. The trust indenture provided that the income from the trust fund should be paid to Gladys D. Smith for life, with the remainder upon her death to the Plaintiff, if living, and if not then living, to her legatees, or if she died intestate, to her distributees under the laws of the State of New York,

Now the trust indenture, as I have said, was executed on February 26, 1937. On March 15, 1938 Mr. Smith filed a [fol. 20] federal gift tax return of said transfer showing the value of the trust fund of five hundred seventy thousand nine hundred thirty-seven dollars fifty cents, and a net taxable gift of the entire fund after deduction of exemptions of five hundred twenty-five thousand nine hundred thirty-seven dollars and fifty cents, and he paid a gift tax thereon of seventy-one thousand six hundred seventy-four dollars twenty-two cents. Shortly thereafter he filed a claim for a refund of said gift tax and on April 15, 1938 the Commissioner rejected said claim in its entirety, and this action is brought to recover the proper amount of this gift tax.

It is the Plaintiff's contention that this tax should only be the value of her life estate in this trust fund, either upon the basis of four per cent, or upon a fixed and determined basis of six per cent on the three thousand shares, or eighteen thousand dollars.

The gift tax due on the first basis, less an exemption of forty-five thousand dollars, has been computed at thirty-one thousand five hundred sixty-five dollars and three cents; and on the second basis at the sum of twenty thousand two hundred sixty-one dollars thirty-three cents, and that we claim we should have the balance between those figures and the seventy-one thousand dollars which he actually paid, on either one or the other of those two theories.

I think I might say that the complaint alleges certain matters as facts, and the answer admits those statements.

For the convenience of Your Honor,—I think there will be no objection to this from Mr. Gibbs,—I would like to submit photostatic copies of certain papers mentioned in the complaint.

Mr. Gibbs: That is right. That is, the trust indenture? [fol. 21] Mr. Michell: Well the other papers are a check in payment of the tax and a letter of the Commissioner rejecting the claim.

Mr. Gibbs: No objection to the trust indenture.

The Court: You want it marked in evidence?

Mr. Michell: I think that probably we better.

The Court: All right. Received.

(Trust indenture dated February 26, 1937 between Hurlbut W. Smith and the Syracuse Trust Company received in evidence as Plaintiff's Exhibit Number 1 of this date.)

Mr. Michell: I offer in evidence Plaintiff's Exhibit 1, being an indenture made, executed and delivered in the City of Syracuse, Onondaga County, New York, on the 26th day of February, 1937, by and between Hurlbut W. Smith, designated as the settler, and the Syracuse Trust Company, designated as the Trustee.

The Court: Received.

Mr. Michell: I offer in evidence as Exhibit 2, the original gift tax return of Hurlbut W. Smith, subscribed and sworn to by him on the 15th day of March 1938, and the affidavit of the Notary thereto attached. This is the original return and bears the stamp: "Received, Filed March 21, 1938". With the permission of the Court I would like to offer this in evidence and to substitute a copy, because it is the original.

Mr. Gibbs: No objection.

The Court: All right. Received.

(Gift tax return of Hurlbut W. Smith sworn to March 15, 1938 received in evidence and marked Plaintiff's Exhibit Number 2 of this date.)

Mr. Michell: I offer in evidence as Exhibit 3 the check [fol. 22] dated March 15, 1938 drawn by H. W. Smith on the Syracuse Trust Company, payable to the Collector of Internal Revenue at Syracuse, New York, for seventy-one

thousand six hundred seventy-four dollars twenty-two cents. With the permission of the Court I would like to withdraw that at the same time and substitute a photostatic copy.

The Court: Received.

Mr. Gibbs: There is no objection, of course, Mr. Michell, as to the date of that check, but I do not believe that is the actual date of the payment of the tax. I think you have got the date noted on the Collector's record. If you are offering that for the purpose that in the event you should win the case and your refund dates back to a certain date as to payment of interest you must be careful as to the exact date.

Mr. Michell: Upon the back of this check, Exhibit 3 appears the following legend: "Received Payment through Syracuse Clearing House March 18, 1938, prior endorsement guaranteed. Merchants National Bank and Trust Company" by somebody "Assistant Cashier."

Mr. Gibbs: No objection.

The Court: Received.

(Photostatic copy of check dated March 15, 1938 payable to Collector of Internal Revenue, Syracuse, New York, in the amount of $71,674.22 by H. W. Smith received in evidence as Plaintiff's Exhibit Number 3 of this date.)

Mr. Michell: I offer in evidence as Exhibit 4 the claim filed by Hurlbut W. Smith, sworn to and subscribed on the 18th day of March, 1938 before Henry A. Eiler, Notary Public, in which he claims refund in the amount of seventy-one thousand six hundred seventy-four dollars twenty-two [fol. 23] cents, and inasmuch as this the original claim produced by the Government I would like to substitute a copy therefor.

Mr. Gibbs: No objection.

Mr. Michell: I think I might also say that the original bears the legend under the Collector's stamp; "Collector, twenty-first district, N. Y., March 15, 1938, Miscellaneous Tax, Division Internal Revenue."

The Court: Received.

(Claim filed by Hurlbut W. Smith sworn to March 18, 1938 for refund on $71,674.22 received in evidence as Plaintiff's Exhibit Number 4 of this date.)

Mr. Michell: Will you mark this please?

(Photostatic copy of letter dated April 15, 1938 to Hurlbut W. Smith from Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner, Treasury Department, Washington, marked Plaintiff's Exhibit Number 5 for identification of this date.)

(Exhibit shown to Mr. Gibbs by Mr. Mitchell.)

Mr. Gibbs: No objection to introducing Exhibit 5.

Mr. Michell: I offer in evidence Exhibit 5, a letter from the Treasury Department, Washington, addressed to Mr. Hurlbut W. Smith, 701 East Washington Street, Syracuse, New York, dated April 15, 1938, signed Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner, rejecting the claim for refund in its entirety.

Here again I would like to substitute a photostatic copy.

(Photostatic copy of letter dated April 15, 1938 to Hurlbut W. Smith from Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner, Treasury Department, [fol. 24] Washington, previously marked for identification, received in evidence as Plaintiff's Exhibit Number 5 of this date.)

Mr. Michell: This morning after Your Honor granted us the courtesy of a recess we agreed upon a stipulation, subject to objection however on the part of either party to the competency, revelancy or materiality of the stipulation itself. Is that a correct statement, Mr. Gibbs?

Mr. Gibbs: That is correct.

Mr. Michell: Now if you will watch me I will read this in the record.

Mr. Gibbs: I will follow you.

STIPULATION AS TO CERTAIN FACTS

Mr. Michell: (Reading): "It is hereby stipulated and agreed by and between the parties hereto and by and between their respective Counsel of record that the following facts are true and may be accepted as evidence in this case, subject to objection, however, on the part of either party to their competency, relevancy or materiality.

1. On February 26, 1937 the value of the corpus of the property transferred in trust is $570,937.50. The annual

four per cent return thereon is equivalent to $22,837.50. Table A of Article XIX, regulation 79, 1936 edition, relating to gift tax under the Revenue Act of 1932, (as amended and supplemented by the Revenue Acts of 1934 and 1935) provides for a factor of 14.11860 at the age of forty-four. Mrs. Smith was forty-four years of age at her nearest Birthday at the date of the execution of the trust indenture. The $22,837.50 yield at four per cent when multiplied by 14.11860 produces $322,433.53, which is the value of the life estate at the date of the execution of the trust instrument on the above basis.

The gift tax due on such basis, less the exemption of $45,000.00 is $31,565.03.

[fol. 25] 2. On February 26, 1937 there were deposited under the trust indenture and pursuant to its terms 3,000 shares of the six per cent cumulative convertible preferred stock, par value $100.00 per share of the L. C. Smith & Corona Typewriters Inc., yielding an annual income at the date of said trust of $18,000.00. Said issue of six per cent preferred stock has continued to pay six per cent dividends annually ever since.

On the basis of the annual income upon said trust fund of said sum of $18,000.00 a year, less $500.00 trustee's commissions allowed by law, the value of the life estate of Gladys D. Smith under the said trust indenture, using the same age and the factor of 14.11860 as was used in subdivision 1 above, is $247,075.50. The gift tax due on such basis, less the exemption of forty-five thousand dollars, is $20,261.33.

3. The gross income of the trust in question, less trustee's fees and payments to beneficiaries, was as follows:

Year	Gross Income	Trustee's Fees	Payments to Ben.	Balance
2-27-37 to 12-31-37	$20,250	$556.25	$19,693.75	00
1938	15,000	425.00	14,575.00	00
1939	7,500	237.50	7,262.50	00

On September 23, 1937 the three thousand shares of convertible preferred stock constituting the trust fund was converted by the Trustee into 15,000 shares of the common stock of L. C. Smith & Corona Typewriters Inc. Dividends

paid on April and July 1st, 1937 amounting to $4,500.00 each were paid on 3,000 shares of preferred stock. Divi- [fol. 26] dends paid on October 1st, 1937 and thereafter were paid on 15,000 shares of common stock."

Now there is a part 4 of this stipulation which I desire to object to as to the competency, relevancy and materiality. I will read it but I do object to it on the ground it is neither competent, relevant or material.

The Court: You read it and I will reserve decision on your objection.

Mr. Michell: (Reading) "4. That the Plaintiff, Hurlbut W. Smith was seventy-two years of age at his nearest birthday on February 26, 1937."

And if Your Honor should decide that it was material or relevant or competent Your Honor will give me an exception to your ruling?

The Court: Yes.

Mr. Gibbs: The Government wishes to object for the same reason for the matter stated in paragraphs 2 and 3.

The Court: All right. I will reserve decision on the objection, and if I rule against you you may have an exception.

Mr. Michell: That is our evidence.

Mr. Gibbs: The Government has no evidence. That is settled by the stipulation.

Motion to Amend Complaint

Mr. Michell: If the Court please: I move to amend the complaint to conform with the evidence offered.

Mr. Gibbs: No objection. We would amend the answer pursuant to the amended complaint.

The Court: Granted.

[fol. 27] Mr. Tompkins: Your Honor: I think the Plaintiff ought to make a statement of what the claim is.

Mr. Michell: We claim the balance of the gift tax.

Mr. Tompkins: What becomes of it, the balance of the tax?

Mr. Michell: Well the balance of the tax we claim is returnable to the Plaintiff.

The Court: I take it the tax was paid by Mr. Smith not from the trust fund, is that right?

Mr. Michell: It was paid by Mr. Smith personally and not from the trust fund.

Mr. Aylesworth: Our contention, briefly, is this: We paid the tax on the entire corpus of the trust fund. We claim that we only owe the Government a gift tax on the life estate and that we are entitled to a refund of the balance which we paid.

The Court: What I was asking, the tax was not paid from the trust fund in any way.

Mr. Michell: Oh no.

The Court: It was paid by Mr. Smith.

Mr. Aylesworth: Yes.

Mr. Gibbs: The allegations are to that effect and there is no contradiction of that. We admit that.

NOTE RE PLAINTIFF'S EXHIBIT 1

Trust Indenture. Printed in Schedule A of Complaint.

[fol. 28] PLAINTIFF'S EXHIBIT 2

Form 709.
Treasury Department.
Internal Revenue Service.
Revised October 1936.

Gift Tax Return

Calendar Year 193—

(To be filed in duplicate under the provisions of the Gift Tax Act of 1932, as amended)

Received Filed March 15, 1938.

Name of Donor Hurlbut W. Smith.
Address 1111 James Street, Syracuse, N. Y.
Citizenship U. S. A.
Residence U. S. A.

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding

$5,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No.")

1. By the creation of an irrevocable trust for the benefit of another; Yes.

2. By making additions to an irrevocable trust previously created for the benefit of another .....;

3. By permitting a beneficiary (other than yourself) to receive the income from a revocable trust, where you possessed the power of revocation and chose during the year not to exercise it, whether such trust was created before or after the enactment, on June 6, 1932, of the Gift Tax Act of 1932 .....;

4. By relinquishing a power to revoke a trust created for the benefit of another .....;

[fol. 29] 5. By permitting another to withdraw funds from a joint bank account which were deposited by you .....;

6. By irrevocably assigning a life insurance policy, or by naming a beneficiary of a policy without retaining any of the legal incidents of ownership therein .....;

7. By paying a premium under an insurance policy in which you retain none of the legal incidents of ownership and the proceeds of which are payable to a beneficiary other than yourself or your estate .....;

8. By conveying title to another and yourself as joint tenants or to your wife or husband and yourself as tenants by the entirety .....;

9. By any other method, direct or indirect .....

If the answer is "Yes" to any of the foregoing, such transfer should be fully disclosed under schedule A or B.

Computation of Amount of Net Gifts for Year

1. Amount of gifts for year other than charitable, etc., gifts (item *c*, schedule A)	$570937.50	
2. Amount of charitable, public, and similar gifts for year (item *c*, schedule B)	4705.21	
3. Total amount of gifts for year (item 1 plus item 2)		$575642.71
4. Amount of charitable, public, and similar gifts for year (item *c*, schedule B)	$4705.21	

5. Specific exemption claimed (see instructions)	45000.00	
[fol. 30] 6. Total deductions (item 4 plus item 5)		$9705.21
7. Amount of net gifts for year (item 3 minus item 6)		$525937.50

Computation of Tax

1. Amount of net gifts for year (item 7, above)	$525937.50
2. Total amount of net gifts for preceding years (item *c*, schedule C)	None
3. Total net gifts (item 1 plus item 2)	$525937.50
4. Tax computed on item 3	
5. Tax computed on item 2	
6. Tax on net gifts for year (item 4 minus item 5) Paid—3/15/38	$71674.22

Affidavit

I swear (or affirm) that this return, including the accompanying schedules and statement, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Gift Tax Act of 1932, as amended, and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedules A or B was made by me (the donor) during said calendar year.

(Signed) Hurlbut W. Smith, H. W. S. (Signature of donor/executor).

[fol. 31] Sworn to and subscribed before me this 15th day of March, 1938. J. M. K. (Signed) Judith Mills Klist, Notary Public. (Seal.) (Signature and title of officer administering oath.) (Notarial Seal.)

Affidavit

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

(Signed) Judith Mills Klist, Secretary, J. M. K. C/o L. C. Smith & Corona Typewriter Inc., Syracuse, N. Y. (Address of person preparing return).

Sworn to and subscribed before me this 15th day of March, 1938. (Signed) Henry A. Eiler, Notary Public. (Seal.) (Signature and title of officer administering oath.) (Notarial Seal.)

Schedule A.—Gifts During Year Other Than Charitable, Public, and Similar Gifts

Item No.	Description of Gift, Motive, and Donee's Name and Address	Date of Gift	Value at Date of Gift
	3000 shares of the convertible preferred stock of L. C. Smith & [fol. 32] Corona Typewriters Inc., a corporation organized under the *the* laws of the State of New York on October 30, 1924, of the par value of $100 per share, returned at a quotation of $190.3125 per share. The stock is unlisted. The location of the principal business office in New York State is 701 East Washington Street, Syracuse, N. Y. The Donee is The Syracuse Trust Company, Trustee under an agreement in writing dated February 26, 1937, a copy of which is hereto annexed and marked "A", and the motive was to provide an income for Gladys D. Smith during her lifetime, with the remainder to her benefici-	2/26/37	$570937.50

aries upon her death, with reversion to the Donor in the event of his survivorship. The net income of said trust for the year 1937 amounted to $19693.75.

(a) Total	$570,937.50
(b) Less total exclusions not exceeding $5,000 for each donee (except future interests)	5,000.00
(c) Included amount of gifts for year other than charitable, etc., gifts	$565,937.50

Schedule B.—Charitable, Public, and Similar Gifts During Year

[fol. 33] Contributions

• • • • • • •

1937

• • • • • • •

Gift Tax Return Form 709
Schedule B

Syracuse Community Chest	$99.26
Betts Memorial Universalist Church	634.50
American Red Cross	100.00
St. Larence University	300.00
Sagola Home	50.00
Syracuse University Alumni Fund	1000.00
Syracuse University	909.00
Syracuse University—Syracuse-in-China	10.00
Young Men's Christian Association	200.00
Rotary Club Charity Fund	50.00
Syracuse Museum of Fine Arts	100.00
Christian Endeavor Convention	50.00
National Recreation Assn.	25.00
National Probation Assn.	10.00
St. Vincent's Orphan Asylum	10.00
Ducks Unlimited (NY State Com.)	30.00
Bethany Baptist Church	5.00
Christian Youth Syracuse Council of Churches	33.75
Lisle Congregational Church	130.00
Ladies Aid Otselic Church	5.00
New York State Conference on Social Work	10.00
Central New York S. P. C. A.	10.00

Syracuse Foundation	5.00
Ozark Mountain School	5.00
Shriners Hospital Fund	2.00
[fol. 34] Onondaga Health Seals	1.00
The Northfield Schools—Cash	1.00
Rev. Frank Hopps—Hamlet Chapel—Cash	10.00
Church of Christ—Cash	5.00
	$4705.21

Schedule C.—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years (Subsequent to June 6, 1932) None.

PLAINTIFF'S EXHIBIT 3

Syracuse, N. Y. March 15, 1938 No. 28974

Pay to the Order of Collector of Internal Revenue at Syracuse, New York $71,674.22

Seventy-one thousand six hundred seventy-four and 22/100 —Dollars in full payment as follows

HURLBUT W. SMITH

(Rubber Stamp)

This check is in payment of an obligation to the United States and must be paid at par. No protest. 1-120

To the Syracuse Trust Company, Syracuse, N. Y. 50-42

(Perforation)

Paid 3-18-38 50-42

H. W. Smith

(Rubber Stamp on back of Check)

This check is in payment of an obligation to the United States and must be paid at par. No Protest. Mar. 16, 1938. [fol. 35] F. J. Shaughnessy, Collector of Internal Revenue, 21st District of New York.

Pay to the Order Any Bank, Banker or Tust Co. Prior Endorsement. Guaranteed.

Received Payment

Through Syracuse Clearing House

Mar 18 1938

Prior Endorsements Guaranteed

MERCHANTS NATIONAL BANK & TRUST CO.

Syracuse, N. Y.

R. E. Ashpole, Cashier.

NOTE RE PLAINTIFF'S EXHIBIT 4

Claim for Refund. Printed in Schedule A of Complaint.

NOTE RE PLAINTIFF'S EXHIBIT 5

Commissioner's letter respecting claim for Refund. Printed in Schedule B of Complaint.

[fol. 36] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

HURLBUT W. SMITH, Plaintiff,

against

FRANK J. SHAUGHNESSY, Collector of Internal Revenue of the United States for the Twenty-first District of New York, Defendant

APPEARANCES:

Messrs. Mackenzie, Smith & Michell, attorneys, (Willis H. Michell, Esq., and Basil B. Aylesworth, Esq. of counsel), for the Plaintiff.

Ralph L. Emmons, Esq., United States Attorney, (B. Fitch Tompkin, Esq., Asst. U. S. Attorney, and Julian G. Gibbs, Esq., Spec. Asst. to Attorney General, of counsel.) for the Defendant.

OPINION—Filed July 15, 1941

BRYANT, D. J.:

This is an action for recovery of gift taxes paid during the year 1937.

On February 26th, 1937, plaintiff executed a trust indenture to the Syracuse Trust Company as Trustee, whereby he established a trust fund consisting of 3000 shares of the 6% convertible preferred stock of the L. C. Smith & Corona Typewriters, Inc., and provided that the income from the said trust fund should be paid to his wife for life with remainder, upon her death, to himself if living, and, [fol. 37] if not then living, to her legatees or, if she died intestate, to her distributees.

On March 15, 1938, plaintiff filed a Federal Gift Tax return of said transfer, showing a value of the trust fund of $570,937.50 and a net taxable gift of the entire fund, after deductions of exemptions, of $525,937.50 and paid a gift tax thereon of $71,674.22. He almost immediately thereafter filed a claim for refund upon the ground that the transfer set forth in the trust indenture did not constitute a taxable gift. On April 15th, 1938, the commissioner rejected said refund claim in its entirety and thereafter this action to recover was timely brought.

Defendant, in his brief, sets forth four questions which he states the issues raised. Possibly time will be saved by answering these questions more or less categorically.

1. Did a transfer of securities by an irrevocable transfer in trust in this case constitute a taxable gift, under the federal gift tax statute, measured by the value of the securities in question in their entirety as of the date of execution of the trust instrument?

Upon the authorities of Klein v. United States, 283 U. S. 231, and Helvering v. Hallock, 309 U. S. 106, I hold that the transfer did not constitute a taxable gift measured by the value of the securities as of the date of the execution of the trust investment.

2. Are the gift taxes and the estate tax statutes *in pari materia*, or are they mutually exclusive?

The two statutes are not mutually exclusive, but are considered *in pari materia*. (Sanford v. Commissioner, 308 U. S. 39; Walker v. Commissioner, 40 B. T. A. 762).

3. If a taxable gift was not effected as contemplated in (1) above, then did the transfer give rise to a taxable gift, [fol. 38] measured by the commuted value of the wife's life interest as of the date of execution of the instrument?

Yes. Under the provisions of said trust indenture the wife received a complete and absolute gift of a life interest in said trust fund. This taxable gift should be measured by the value of the wife's life interest as of the date of the execution of the instrument.

4. If the transfer gave rise to a taxable gift as contemplated in (3) above is the commuted value of the wife's life interest to be computed on the basis of a 4% annual

return pursuant to the official Regulations, or on the basis of an actual annual 6% return on the securities involved, and is the refund claim sufficient to raise such question?

The question as framed by defendant could easily mislead. Both methods of computation, rather than one, set forth in the question are provided for in the official Regulations. The cash value of the wife's life interest should be computed according to the provisions of Subd. g, Sec. 85.19, Chap. 1, Title 26 of the Code of Federal Regulations. The portion of subdivision g, which seems to be applicable, reads:

"If a gift consists of the donor's right to receive the entire income of certain property during the life of Z, or for a term of years, and the annual rate of income for a period equal to or exceeding the life expectancy of Z, or for such term of years, is fixed or definitely determinable at the time of the gift, then the value of the gift should be computed as explained above in the case of an annuity. If the rate of annual income is not determinable, or if the donor is entitled merely to the use of nonincome-producing [fol. 39] property, a hypothetical annuity at the rate of 4 percent of the value of the property should be made the basis of the calculation."

It was stipulated that the stock (convertible preferred 6% stock) yielded an annual income of $18,000.00 at the time of the making of the trust indenture and that it has paid 6% since that time. The stipulation further shows that the trustee's commissions allowed by law amount to $500.00 per year, and that the wife's expectancy of life, at the time of the making of the trust was 14:11860.

It is plaintiff's contention that the income "was fixed and definitely determinable at the time of the gift." He claims a fixed maximum annual income of $17,500.00 ($18,000.00 income less $500.00 commissions), and that the value of the life interest should be computed by multiplying $17,500.00 by the above mentioned factor. This computation makes the value of the life interest $247,075.50. On that valuation the tax amounts to $20,261.33.

Defendant says there was not "a fixed or definitely determinable annual rate of income" at the time of transfer. He contends that the value of the life interest must be computed as provided in the last part of the quoted portion of

the subdivision, that is by multiplying 4% of the full value of the stock at time of transfer (which was $570,937.50) by the above mentioned factor. Computed under this method the life interest had a value of $322,433.53. The gift tax on such valuation amounts to $31,565.03.

My answer is in favor of defendant's contention. Were it not for the convertible feature, I would answer directly the opposite. The tax should be computed upon the same basis that the Commissioner would have computed it, had he taxed the value of a life interest only. The taxable gift [fol. 40] was donor's right to receive the dividends on the stock transferred, or stock received on conversion thereof, during the period of his wife's left expectancy. The annual income therefrom could not then be definitely ascertained. Without conversion the income was fixed, but through conversion it might be more or less. To hold that donor can give a life interest in preferred convertible stock and satisfy the taxing statute by paying a tax on value computed on rate of preferred dividend, when the trustee can, the next day, convert into stock that may pay larger dividends, favors facile tax avoidance. That the trustee here had power to convert cannot be questioned because it has done so in part.

My holding on method of computation obviates the necessity of answering the last part of question (4).

Upon the trial the defendant objected to paragraphs 2 and 3 of the stipulation of facts upon the ground that the same were immaterial, irrelevant and incompetent. I reserved decision. I now over-rule the objection. The defendant is entitled to exceptions thereto. The plaintiff objected to paragraph four of the stipulation of facts on the same grounds. I now sustain the objection. Defendant is entitled to an exception. I see no necessity for here quoting the paragraph ruled upon.

Plaintiff is entitled to judgment for the sum of $40,109.19 with interest and costs.

Findings of material facts and Conclusions may be presented on notice.

Dated: July 14th, 1941.

Frederick H. Bryant, United States District Judge.

[fol. 41] IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF NEW YORK

[Title omitted]

Findings of Fact and Conclusions of Law—Filed September 10, 1941

The issues of fact and law in the above entitled action having been tried by the court without a jury at a Regular Term of the United States District Court held in and for the Northern District of New York, at the Federal Building, Syracuse, New York, on October 28, 1940, and the evidence and proofs of the parties having been taken, and after hearing Willis H. Michell, and Basil B. Ayleworth, of Mackenzie, Smith & Michell, Solicitors for plaintiff, and B. Fitch Tompkins and Julian G. Gibbs, of counsel, and Solicitors for defendant, and after due consideration of the evidence and the briefs submitted by the parties, the court hereby decides, and makes findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1. That the plaintiff is a citizen of the State of New York and of the United States, and a resident of the City of Syra-
[fol. 42] cuse, County of Onondaga and State of New York, and of the Northern District of New York.

2. That at all times herein mentioned the defendant Frank J. Shaughnesy was and now is a resident of the City of Syracuse, County of Onondaga and State of New York and of the Northern District of New York, and was and now is the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the Twenty-first District of New York.

3. That on the 26th day of February, 1937, pursuant to and by the provision of a Trust Indenture dated on that day, executed by and between the plaintiff and The Syracuse Trust Company, a banking corporation of Syracuse, New York, the plaintiff assigned, transferred and set over irrevocably unto said The Syracuse Trust Company and its successors three thousand (3000) shares of the convertible preferred stock of L. C. Smith & Corona Typewriters, Inc., a New York Corporation, having its principal office and place for the transaction of business in the City of Syra-

cuse, New York, in trust nevertheless, to manage and control said property and to keep the same or the proceeds thereof invested and to collect the income thereof and to pay over the net income from said trust fund quarterly to and for the use of Gladys D. Smith, wife of the plaintiff, during her life, and upon her death, to pay over the principal of said trust fund to the plaintiff, if he be then living, or in the event of the death of the plaintiff, prior to the death of his said wife, to pay over said principal of said trust to such person or persons and in such amounts and proportions as the said life beneficiary should by her last Will and Testament direct, and in the event of her failure to make a testamentary disposition thereof, then to such per- [fol. 43] son or persons and in such amounts and proportions as would take the same under the laws of the State of New York in case the principal of said trust fund had been owned outright by the said life beneficiary and she had died intestate.

4. That thereafter and on March 15, 1938, the plaintiff made and filed with the defendant, Collector for the Twenty-First District of New York, a return of said transaction and transfer for gift tax purposes showing the full value of the principal of said trust fund on February 26, 1937, the date of the creation of said trust fund, of $570,937.50.

5. That upon said return, and upon said full value of said trust fund, after deducting therefrom the exemption of $40,000 and the exclusion of $5,000 claimed by plaintiff in said return, the defendant, Collector as aforesaid, assessed a federal gift tax in the amount of $71,674.22, which tax was paid by the plaintiff to said defendant, Collector as aforesaid, on March 15, 1938, by plaintiff's check, payment on which was completed through Syracuse Clearing House on March 18, 1938.

6. That on March 18, 1938, the plaintiff filed with the defendant, Collector as aforesaid, a duly verified claim, in form as approved by law, for the refund of said gift tax so assessed, collected and paid, on the ground that the transfer set forth in said Trust Indenture did not constitute a taxable gift.

7. That thereafter and on April 15, 1938, the Commissioner of Internal Revenue rejected said claim for refund

in its entirety, and notified the plaintiff of such rejection by letter forwarded by registered mail, which letter of rejection was deliverd to and received by plaintiff on or about April 16, 1938.

[fol. 44] 8. That this action was commenced by the issuance and personal service of the summons, with the complaint herein, on March 14, 1940, and within the time permitted by law.

9. That the full value of said trust fund on the date of the execution of said Trust Indenture was $570,937.50.

10. That the annual rate of income from said trust fund for a period equal to the life expectancy of said Gladys D. Smith was not fixed or definitely determinable at the date of the execution of said Trust Indenture because the trust property was convertible, and that the value of the life interest of said Gladys D. Smith in said trust fund should be computed upon the basis of a hypothetical annuity at the rate of 4% upon the value of said trust fund on the date of the execution of said Trust Indenture.

11. That the trustees' commissions upon the annual income of said trust fund at the date of the execution of said Trust Indenture, as allowed by law and as stipulated herein, amounted to $500. and should be deducted from the amount of the hypothetical annuity in computing the value of said life interest.

12. That on February 26, 1937, the date of the execution of said Trust Indenture, said Gladys D. Smith was 44 years of age at her nearest birthday.

13. That the expectancy of life of said Gladys D. Smith on February 26, 1937, was 14.11860 years, which is the factor to be used in computing the value of her life interest in said Trust Fund.

14. That the value of the life interest of Gladys D. Smith in said trust fund at the date of the execution of said Trust Indenture, as stipulated herein, was $322,433.53.

15. That the plaintiff is entitled to an exemption of $40,-
[fol. 45] 000 and an exclusion of $5,000 from said value of said life estate, in computing the gift tax thereon.

16. That the federal gift tax on the transfer of said life interest to Gladys D. Smith, as stipulated herein, amounts to the sum of $31,565.03.

17. That the difference between the amount paid by the plaintiff as gift tax on the entire interest in said trust fund, and the amount of the gift tax on said life interest therein is $40,109.19.

CONCLUSIONS OF LAW

1. That under the provisions of said Trust Indenture, the transfer of said securities pursuant thereto did not constitute a taxable gift measured by the total value of said securities.

2. That under the provisions of said Trust Indenture, there was thereby made a complete and absolute gift of a life interest in said trust fund to Gladys D. Smith.

3. That the transfer of said life interest to Gladys D. Smith constituted a taxable gift, the amount of which for gift tax purposes is measured by the value of said life interest as of the date of the execution of said Trust Indenture.

4. That the value of said life interest of Gladys D. Smith should be computed upon the basis of a hypothetical annuity at the rate of 4 per cent upon the value of the trust fund on the date of the Trust Indenture.

5. That a federal gift tax upon the transfer of said life interest to Gladys D. Smith in the sum of $31,565.03 as stipulated herein, became due and payable to the defendant.

6. That the plaintiff is entitled to recover from the defendand the amount paid by plaintiff as gift tax, less said [fol. 46] amount of the gift tax due upon the transfer of said life estate, such balance amounting to the sum of $40,109.19, and to have judgment against the defendant for said sum of $40,109.19, with interest from March 18, 1938 until payment thereof, and costs. Judgment is directed to be entered accordingly.

Dated: September 9, 1941.

Frederick H. Bryant, United States District Judge.

In District Court of the United States, Northern District of New York

Hurlbut W. Smith, Plaintiff,

vs.

Frank J. Shaughnessy, Collector of Internal Revenue of the United States for the Twenty-first District of New York, Defendant

Civil Action File No. 386

Judgment—September 9, 1941

This cause having come on regularly for trial before the Court without a jury at a regular term of the United States District Court held in and for the Northern District of New York, at the Federal Building, Syracuse, New York, on October 28, 1940, and Mackenzie, Smith & Michell, Esqs., appearing as Solicitors for Plaintiff, by Willis H. Michell [fol. 47] and Basil B. Aylesworth, and Ralph L. Emmons, Esq., United States Attorney, appearing as Attorney for Defendant, by B. Fitch Tompkins and Julian G. Gibbs, of Counsel; and the trial having been proceeded with and evidence on behalf of the parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having rendered its decision and filed its Findings of Fact and Conclusions of Law and ordered that judgment be entered in accordance with said Findings and Conclusions;

Now, on motion of Mackenzie, Smith & Michell, Solicitors for Plaintiff, it is

Adjudged that the plaintiff above named, Hurlbut W. Smith, do have and recover of and from the defendant above named, Frank J. Shaughnessy, Collector of Internal Revenue of the United States for the Twenty-first District of New York, the principal sum of Forty Thousand One Hundred Nine Dollars and Nineteen Cents ($40,109.19) with interest thereon from March 18, 1938, until paid at the rate of six percent (6%) per annum, and the sum of Twenty-four Dollars and Sixty Cents ($24.60), costs of this proceeding this day taxed by the Clerk of this Court.

Done and ordered at Syracuse, N. Y., this 9 day of September, 1941.

Frederick H. Bryant, United States District Judge.

[fols. 48-49] Bill of costs omitted in printing.

[fol. 50] In United States District Court, Northern District of New York

[Title omitted]

Certification by Judge Bryant—Filed September 11, 1941

I, Frederick H. Bryant, United States District Judge, before whom the above action was tried, do hereby certify that the defendant is a revenue officer of the United States, Collector of Internal Revenue, District No. 21; and for all his acts in respect to the matter in suit he had probable cause and acted under the laws of the United States and direction of the United States Secretary of the Treasury and other proper officers of the United States.

Dated: September 8, 1941.

Frederick H. Bryant, United States District Judge.

[fol. 51] In United States District Court, Northern District of New York

[Title omitted]

Notice of Appeal—December 9, 1941

Notice Is Hereby Given that Frank J. Shaughnessy, Collector of Internal Revenue for the Twenty-first District of New York, defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on the 10th day of September, 1941.

Dated, December 9, 1941.

Ralph L. Emmons, United States Attorney and Attorney for Appellant, Address: Federal Building, Binghamton, N. Y.

To Glen A. Porter, Clerk, U. S. District Court, Utica, N. Y. Mackenzie, Smith & Michell, Attorneys for Plaintiff, 821 Onondaga County Savings Bank Bldg., Syracuse, N. Y.

[fol. 52] In District Court of the United States, Northern District of New York

[Title omitted]

Points to be Relied Upon on Appeal

Comes now the defendant, by his attorney, Ralph L. Emmons, United States Attorney, and files the following as his points to be relied upon on appeal:

1. Plaintiff, on February 26, 1937, established an irrevocable trust, the income from which was payable to his wife for life. Upon her death the principal reverts to the settlor, if living, or if he be not living, then to his wife's appointees or next of kin. Plaintiff paid a gift tax on the assumption that the full value of the securities transferred to the trust was subject to gift tax. In the District Court he contended that the tax had been erroneously paid on the ground that the transfer in trust did not constitute a completed gift. The defendant contended that the transfer constituted a taxable gift measured by the full value of the properties transferred. The Court held that the value of the wife's life estate only was subject to the tax. The Court erred in so holding.

[fol. 53] 2. The Court erred in not holding that the entire value of the securities transferred to the trust, less only the grantor's reversionary interest, is subject to the tax.

3. The Court erred in entering judgment for plaintiff.

Ralph L. Emmons, United States Attorney.

In United States District Court, Northern District of New York

[Title omitted]

Order Extending Time to File Record—Filed January 13, 1942

On application of the United States of America, appellant in the above action, and under provisions of Rule 73, it is

Ordered that the time within which the appellant shall file the record on appeal with the Circuit Court of Appeals for the Second Circuit herein is hereby extended to March 5th, 1942.

[fol. 54] Dated: January 10, 1942.

Frederick H. Bryant, United States District Judge.

In United States District Court, Northern District of New York

[Title omitted]

Stipulation as to Record

It is hereby Stipulated that the foregoing printed record contains a full, true and correct record of the pleadings necessary for the determination of the appeal herein, including the opinion or decision of the United States District Judge filed herein and that the Clerk of the U. S. District Court for the Northern District of New York, shall make return thereof and file the same with the United States Circuit Court of Appeals for the Second Circuit without further comparison as and for a complete and true transcript of the record on the appeal in said cause.

[fol. 55] Dated February —, 1942.

Ralph L. Emmons, United States Attorney for the Northern District of New York, Attorney for Defendant-Appellant. Mackenzie, Smith & Michell, Attorneys for Plaintiff-Appellee, 821 Onondaga County Savings Bank Bldg., Syracuse, New York.

[fol. 56] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 57] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

(Argued May 20, 1942)

HURLBUT W. SMITH, Appellee,

v.

FRANK J. SHAUGHNESSY, Collector, Appellant

On appeal from a judgment of the District Court for the Northern District of New York in favor of the plaintiff, in an action to recover taxes wrongfully collected.

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

L. W. Post for the appellant.
Basil B. Aylesworth for the appellee.

OPINION—June 19, 1942

Per Curiam:

Reversed and complaint dismissed on the authority of *Herzog* v. *Commissioner*, 116 Fed. (2d) 591 (C. C. A. 2).

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

HURLBUT W. SMITH, Plaintiff-Appellee,

v.

FRANK J. SHAUGHNESSY, Collector, etc., Defendant-Appellant

JUDGMENT—July 6, 1942

Appeal from the District Court of the United States for the Northern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District

Court be and it hereby is reversed with costs and cause remanded with a direction to dismiss the complaint.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 429

ORDER ALLOWING CERTIORARI—Filed November 9, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 46930. U. S. Circuit Court of Appeals, Second Circuit. Term No. 429. Hurlbut W. Smith, Petitioner, vs. Frank J. Shaughnessy, Collector of Internal Revenue of the United States for the Twenty-first District of New York. Petition for a writ of certiorari and exhibit thereto. Filed September 29, 1942. Term No. 429. O. T. 1942.